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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 BENITO MARQUEZ,
12 Plaintiff,
13 v.
14 L. MCEWEN, et al.,
15 Defendants.

Case No. CV 15-7911 R (SS)

MEMORANDUM AND ORDER
DISMISSING COMPLAINT WITH
LEAVE TO AMEND

16
17 **I.**

18 **INTRODUCTION**
19

20 On October 8, 2015, Plaintiff Benito Marquez ("Plaintiff")
21 filed a civil rights complaint pursuant to 42 U.S.C. § 1983 (the
22 "Complaint") against various defendants. For the reasons stated
23 below, the Complaint is dismissed with leave to amend.¹
24
25
26

27 ¹ Magistrate judges may dismiss a complaint with leave to amend
28 without approval of the district judge. See McKeever v. Block,
932 F.2d 795, 795 (9th Cir. 1991).

1 Congress mandates that district courts initially screen
2 civil complaints filed by prisoners seeking redress from a
3 governmental entity or employee. 28 U.S.C. § 1915A(b). This
4 Court may dismiss such a complaint, or any portions thereof,
5 before service of process if the Court concludes that the
6 complaint (1) is frivolous or malicious, (2) fails to state a
7 claim upon which relief can be granted, or (3) seeks monetary
8 relief from a defendant who is immune from such relief. 28
9 U.S.C. § 1915A(b) (1)-(2); see also Lopez v. Smith, 203 F.3d
10 1122, 1126-27 & n.7 (9th Cir. 2000) (en banc).

11 12 II.

13 ALLEGATIONS AND CLAIMS OF THE COMPLAINT

14

15 Plaintiff sues the following employees of the California
16 State Prison, Los Angeles County (the "Prison") in both their
17 individual and official capacities: (1) Acting Warden L. McEwen;
18 (2) correctional officer R. Aguirre; and (2) medical doctor J.
19 Fitter (collectively "Defendants"). (Complaint at 3).²

20
21 On July 21, 2012, while Plaintiff was using the inmate
22 telephone at the Prison, a fight took place fifteen yards away.
23 (Id. at 5, 11). Although Plaintiff was not involved in the
24 fight, Aguirre, who was supervised by McEwen, "shot and fired (1)
25 [r]ound of [d]irect [i]mpact XM 1006 projectile from his state
26

27 ² Plaintiff attaches several pages and exhibits to the civil
28 rights complaint form. For ease of reference, the Court refers
to these pages as if consecutively numbered.

1 issued 40mm (millimeter) [l]auncher, striking Plaintiff causing
2 him to drop and fall in pain and agony in fear of other
3 unprovoked[d] trauma by way of fire arms." (Id.).

4
5 The Complaint raises two claims.³ In Claim One, Plaintiff
6 claims that Defendants violated his Eighth Amendment Rights.
7 (Id. at 5, 11-17). Plaintiff claims Aguirre used excessive force
8 when he "raised his weapon and deliberately shot" Plaintiff in
9 the lower right leg, and did so to "cause harm not to restore
10 discipline or order." (Id. at 12-15). Plaintiff next claims
11 that McEwen is liable for Aguirre's actions because he failed to
12 maintain the "safety and security of all inmates" by way of
13 establishing policies, rules and or train[ing] to staff in proper
14 usage of equipment such as the 40mm Launcher use[d] to strike
15 Plaintiff to do so." (Id. at 11-12). According to Plaintiff,
16 McEwen failed to train Aguirre and failed to prevent Plaintiff
17 from suffering harm. (Id.). Finally, Plaintiff claims that
18 Fitter was deliberately indifferent to his medical needs because
19 Fitter knew he had an "open wound and should not apply pressure
20 on my right leg," yet he "refuse[d] to stitch my wound causing my
21 wound to become infected" and "refuse[d] to order me a walking
22 cane to relieve my injured leg from pain due to the pressure
23 inflicted by walking back and [f]orth over a qua[r]ter mile to
24 the [f]ood [h]all to eat." (Id. at 16-17).

25
26
27 ³ The principal source of the facts underlying Plaintiff's claims
28 are included several pages attached to the Complaint. (See
Complaint at 11-23).

1 Although the Complaint is unclear, in claim two, Plaintiff
2 principally alleges that Defendants violated his Fourteenth
3 Amendment due process rights by failing to comply with certain
4 state prison procedures, laws or policies. (Id. at 19-23). More
5 specifically, Plaintiff alleges that McEwen failed to comply with
6 "state procedure in properly training his employee (officers) on
7 the correct use of force" and that he "set forth policies . . .
8 that allowed officers to use excessive force." (Id. at 19-20).
9 Plaintiff next contends that Aguirre failed to follow certain
10 "state law and policy" regarding the use of force and safety and
11 control of the inmates. (Id. at 20-12, citing to California Code
12 of Regulations title 15, sections 3268 (use of force), 3271
13 (responsibility of employees) and 3278 (control of inmates)).
14 Finally, Plaintiff alleges that medical doctor Fitter violated
15 "state policy" and "state procedure" by denying him "relief by
16 way of medical treatment." (Id. at 21-23, citing to California
17 Code of Regulations title 15, section 3271 (safety of all
18 inmates)).

19
20 Plaintiff seeks a "declaration that the acts and omissions
21 described herein violated [his] rights under the Constitution," a
22 "preliminary and permanent injunction ordering defendants (L.
23 McEwen and A. Aguirre) to no longer use 40mm Launcher in the
24 dayroom of [the] institution buildings[] without first using
25 [g]as cans," compensatory damages of \$100,000.00, punitive
26 damages of \$20,000.00 against each defendant, a jury trial, "cost
27 in this suit," and "[a]ny additional relief this court deems
28 just, proper, and equitable." (Id. at 6).

III.

DISCUSSION

Under 28 U.S.C. § 1915A(b), the Court must dismiss the Complaint due to defects in pleading. Pro se litigants in civil rights cases, however, must be given leave to amend their complaints unless it is absolutely clear that the deficiencies cannot be cured by amendment. Lopez, 203 F.3d at 1127-29. Accordingly, the Court grants Plaintiff leave to amend, as indicated below.

A. Plaintiff Fails To State A Claim Against Defendant Fitter In His Official Capacity

Plaintiff sues all Defendants in both their individual and official capacities. Plaintiff seeks compensatory and punitive damages and cost of suit from each Defendant, as well as a declaration that their acts violated the Constitution. (Complaint at 6). Plaintiff also seeks injunctive relief, but only against Defendants McEwen and Aguirre. (Id.).

Pursuant to the Eleventh Amendment, a state and its official arms are immune from suit under section 1983. Howlett v. Rose, 496 U.S. 356, 365 (1990); Brown v. Cal. Dept. of Corrections, 554 F.3d 747, 752 (9th Cir. 2009) ("California has not waived its Eleventh Amendment immunity with respect to claims brought under § 1983 in federal court"). "[A] suit against a state official in his or her official capacity . . . is no different from a suit

1 against the State itself.” Flint v. Dennison, 488 F.3d 816, 824–
2 25 (9th Cir. 2007) (citation omitted). Therefore, state
3 officials sued in their official capacity are generally entitled
4 to immunity. Id. at 825. However, state officials sued in their
5 official capacity are considered “person[s]” when they are sued
6 for prospective injunctive relief under section 1983, and the
7 Eleventh Amendment does not bar such claims. Id. (citing
8 Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)).

9
10 Defendant Fitter is a state employee sued in his official
11 capacity, for monetary damages only. (Complaint at 3-5).
12 Plaintiff does not seek injunctive relief against Fitter
13 warranting an exception to the Eleventh Amendment bar. (Id. at
14 6). Therefore, Plaintiff’s official capacity claim against
15 Fitter is functionally a suit against the state of California.
16 Accordingly, Plaintiff’s claim against Fitter in his official
17 capacity is barred by the Eleventh Amendment and must be
18 dismissed.

19
20 **B. The Complaint Fails To State A Claim For Deliberate**
21 **Indifference To A Serious Medical Need**
22

23 To state a claim for deliberate indifference to serious
24 medical needs, a prisoner must show that he was confined under
25 conditions posing a risk of “objectively, sufficiently serious”
26 harm and that the officials had a sufficiently culpable state of
27 mind in denying the proper medical care. Morgan v. Morgensen,
28

1 465 F.3d 1041, 1045 (9th Cir. 2006). There must be a purposeful
2 act or failure to act on the part of the official resulting in
3 harm to Plaintiff. See Jett v. Penner, 439 F.3d 1091, 1096 (9th
4 Cir. 2006). Deliberate indifference “entails something more
5 than mere negligence.” Hearns v. Terhune, 413 F.3d 1036, 1040
6 (9th Cir. 2005) (quoting Farmer v. Brennan, 511 U.S. 825, 835
7 (1994)); see also Wood v. Housewright, 900 F.2d 1332, 1334 (9th
8 Cir. 1990) (“[M]ere malpractice, or even gross negligence,” in
9 the provision of medical care does not establish a constitutional
10 violation).

11
12 Plaintiff’s allegations fail to state a claim for deliberate
13 indifference against Dr. Fitter. Plaintiff asserts that medical
14 records that Fitter received showed that Plaintiff had an “open
15 wound and should not apply pressure on [his] right leg,” yet the
16 day after the incident, Fitter refused to “stitch [Plaintiff’s]
17 wound causing [it] to become infected” and refused to order him a
18 walking cane. (Complaint at 15-17). However, according to
19 Plaintiff’s exhibits, on the day of the incident, Plaintiff
20 received treatment for his injury initially at the Prison, but
21 then was transported to an outside medical facility for a higher-
22 level of care. (Id. at 29-36). Plaintiff’s allegations do not
23 satisfy the elements for a deliberate indifference claim.
24 Plaintiff must allege, if he can, facts showing that Fitter was
25 aware that denying Plaintiff stitches and a cane posed a serious
26 risk of harm, if indeed Plaintiff was transferred immediately to
27 an outside medical facility, and that Fitter purposefully failed
28

1 to respond to this serious medical need. Accordingly, the
2 Complaint must be dismissed, with leave to amend.

3
4 **C. The Complaint Fails To State A Claim For A Fourteenth**
5 **Amendment Violation**

6
7 The gravamen of Plaintiff's second claim appears to be that
8 his due process rights were violated when Defendants failed to
9 comply with certain state prison policies, procedures or rules.
10 (Id. at 19-23). Plaintiff's allegations regarding this claim are
11 not entirely clear. In any amended complaint, Plaintiff shall
12 clarify the particular policy violated and how such violation
13 states a cause of action against Defendants.

14
15 The mere violation of state prison protocols is not
16 actionable under § 1983. See Sandin v. Conner, 515 U.S. 472, 484
17 (1995) (holding state-created liberty interests protected by the
18 Due Process Clause are "limited to freedom from restraint" that
19 "imposes atypical and significant hardship on the inmate in
20 relation to the ordinary incidents of prison life.)). To state a
21 claim under § 1983, "a plaintiff must allege the violation of a
22 right secured by the Constitution and laws of the United States,
23 and must show that the alleged deprivation was committed by a
24 person acting under color of state law." West v. Atkins, 487
25 U.S. 42, 48 (1988) (citations omitted). Plaintiff's allegations
26 are confusing and unclear, as he mixes allegations of law with
27 various unrelated facts. The Court cannot determine the nature
28

1 of his due process claims. Accordingly, Plaintiff's second claim
2 must be dismissed, with leave to amend.

3
4 **D. The Complaint Fails To Satisfy Federal Rule Of Civil**
5 **Procedure 8**

6
7 Federal Rule of Civil Procedure 8(a)(2) requires that a
8 complaint contain "'a short and plain statement of the claim
9 showing that the pleader is entitled to relief,' in order to
10 'give the defendant fair notice of what the . . . claim is and
11 the grounds upon which it rests.'" Bell Atlantic Corp. V.
12 Twombly, 550 U.S. 544, 555, (2007). Rule 8(e)(1) instructs that
13 "[e]ach averment of a pleading shall be simple, concise, and
14 direct." A complaint violates Rule 8 if a defendant would have
15 difficulty understanding and responding to the complaint.
16 Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637
17 F.3d 1047, 1059 (9th Cir. 2011).

18
19 Here, the Complaint does not comply with the standards of
20 Rule 8. The Complaint contains redundant and unnecessary details
21 about the circumstances of the incident and conclusory
22 allegations. Plaintiff also fails to present all his claims in
23 the body of the Complaint or on consecutive pages. (Complaint at
24 5, 11-23). Although Plaintiff utilizes the standard form for
25 civil rights complaints (id. at 1-6), it is followed by four
26 pages from Plaintiff's administrative appeal (id. at 10), then
27 twelve pages of legal argument containing the principal source of
28 Plaintiff's two claims (id. at 11-23) and thirteen pages of

1 exhibits (id. at 24-36). It is also unclear why Petitioner
2 attaches the four pages from his administrative appeal following
3 the civil rights complaint form. Further, because Plaintiff is
4 not required to provide evidence to support his claims at this
5 state of the litigation, the exhibits attached to the complaint
6 are unnecessary. Consequently, the Complaint fails to provide a
7 simple, concise and direct statement of the violation alleged to
8 allow a defendant to have fair notice of the claim against him
9 and the ability to adequately respond. See Twombly, 550 U.S. at
10 555.

11
12 Accordingly, the Complaint is dismissed with leave to amend.
13 Should Plaintiff choose to file an Amended Complaint, Plaintiff
14 is advised to, present all his claims in the body of the
15 Complaint and on continuous pages, separate each claim, clearly
16 identify the nature of the legal claims he is bringing, the
17 specific facts giving rise to his claims against each individual
18 Defendant, and the relief sought.

19
20 **IV.**

21 **CONCLUSION**

22
23 For the reasons stated above, the Complaint is dismissed
24 with leave to amend. If Plaintiff still wishes to pursue this
25 action, he is granted **thirty (30) days** from the date of this
26 Memorandum and Order within which to file a First Amended
27 Complaint. In any amended complaint, the Plaintiff shall cure
28 the defects described above. **Plaintiff shall not include new**

1 defendants or new allegations that are not reasonably related to
2 the claims asserted in the original complaint. The First Amended
3 Complaint, if any, shall be complete in itself and shall bear
4 both the designation "First Amended Complaint" and the case
5 number assigned to this action. It shall not refer in any manner
6 to any previously filed complaint in this matter.

7
8 In any amended complaint, Plaintiff should confine his
9 allegations to those operative facts supporting each of his
10 claims. Plaintiff is advised that pursuant to Federal Rule of
11 Civil Procedure 8(a), all that is required is a "short and plain
12 statement of the claim showing that the pleader is entitled to
13 relief." **Plaintiff is strongly encouraged to utilize the**
14 **standard civil rights complaint form when filing any amended**
15 **complaint, a copy of which is attached.** In any amended
16 complaint, Plaintiff should identify the nature of each separate
17 legal claim and make clear what specific factual allegations
18 support each of his separate claims. Plaintiff is strongly
19 encouraged to keep his statements concise and to omit irrelevant
20 details. It is not necessary for Plaintiff to cite case law or
21 include legal argument. Plaintiff is also advised to omit any
22 claims for which he lacks a sufficient factual basis.

23
24 **Plaintiff is explicitly cautioned that failure to timely**
25 **file a First Amended Complaint, or failure to correct the**
26 **deficiencies described above, will result in a recommendation**
27 **that this action be dismissed with prejudice for failure to**
28 **prosecute and obey Court orders pursuant to Federal Rule of Civil**

1 Procedure 41(b). Plaintiff is further advised that if he no
2 longer wishes to pursue this action, he may voluntarily dismiss
3 it by filing a Notice of Dismissal in accordance with Federal
4 Rule of Civil Procedure 41(a)(1). A form Notice of Dismissal is
5 attached for Plaintiff's convenience.

6
7 DATED: December 22, 2015

8 /s/
9 SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE